In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-267

LUIS CHARBONIER AND RAUL CHARBONIER, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 74-5268

JAMES BURKE, HENRY HILL AND LOUIS LOPEZ, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners in No. 74-5268 (the Burke petitioners) contend that their trial should have been severed from that of petitioners in No. 74-267 (the Charboniers). They also assert that they were prejudiced by the admission of hearsay, and that their federal trial was barred by their acquittal on similar state charges. The Charboniers adopt the double jeopardy claim of the Burke petitioners, proffer several claims of prosecutorial misconduct, and challenge the trial court's refusal to give two requested instructions.

After a jury trial in the United States District Court for the Middle District of Florida, petitioners were convicted of making extortionate extensions of credit, using extortionate means to collect debts, and interstate travel in aid of an unlawful gambling enterprise, in violation of 18 U.S.C. 892, 894, and 1952.[1] Petitioners Luis and Raul Charbonier also were convicted of using interstate telephone facilities in violation of 18 U.S.C. 1952. Each petitioner was sentenced to concurrent sentences totalling a term of ten years' imprisonment. The court of appeals affirmed (Charbonier Pet. App. I; 495 F. 2d 1226). Timely petitions for rehearing were denied on August 9, 1974. The Burke petition for a writ of certiorari was filed on September 9, 1974. The Charboniers petition for a writ of certiorari was filed on September 10, 1974, and therefore is out of time under Rule 22(2) of the Rules of this Court. In any event there is no issue in either petition justifying further review.

The evidence at trial showed that petitioner Raul Charbonier induced Gaspar Ciaccio and Feliz LoCicero to place bets on baseball games using an odds sheet he regularly received by telephone from New York. He assured them that the betting scheme was rigged in their favor (Tr. 499). But after initial success Ciaccio and LoCicero began losing consistently until their combined debts approximated $13,000. Advised by a friend that the odds were actually rigged to ensure losing bets, they discontinued play. Ciaccio refused to pay his remaining losses despite repeated demands from both Charboniers and a threat by Raul Charbonier to "bring some people down here and get the money one way or the other" (Tr. 527).

---

[1]Cosmo Rosado was indicted with petitioners but died before trial.

On October 8, 1970, the Burke petitoners arrived from New York and, joined by petitioner Luis Charbonier, confronted Ciaccio about payment of his debt. When he proved recalcitrant, petitioner Burke nudged a gun against his ribs and Ciaccio accompanied the men to a lounge owned by petitioner Raul Charbonier (Tr. 544). In a car on the way to the lounge, and again at the lounge, Ciaccio was severely beaten (Tr. 568, 584). Ciaccio's brother Fano was summoned to the lounge by petitioner Raul Charbonier and given a week to produce $8,000 (Tr. 1306). Gaspar Ciaccio subsequently borrowed the money and paid the Charboniers. Also on the night of October 8 petitioner Raul Charbonier telephoned Lo Cicero and informed him that "they" had Gaspar, had gasoline in the car, and wanted to come and see him (Tr. 242). It was quickly agreed that if LoCicero paid the balance of his losses the next morning there would be no visit. LoCicero subsequently paid petitioner Raul Charbonier $4,000 to cancel the gambling debt (Tr. 248). On October 9 the Burke petitioners returned to New York.

1. Prior to trial the Burke petitioners filed motions for severance from the Charboniers. They submitted affidavits by the Charboniers, who asserted they would testify and exculpate the Burke petitioners if severance were granted. The motions were denied, and the court of appeals determined that the affidavits failed to show what the Charboniers would have testified to, why their testimony would have been exculpatory, or, most importantly, why they were willing to testify at a separate trial but not in the joint one (Charbonier Pet. App. I, p. A-17). After considering petitioners' interests in severance, as well as the countervailing factors of judicial economy and administration—petitioners had delayed commencement of the trial nearly two years after indictment,

the trial required almost three weeks, and separate trials would have required virtual duplication of effort and expense—the court concluded that the trial judge had not abused his discretion, and that petitioners had shown no prejudice depriving them of a fair trial. *Opper* v. *United States*, 348 U.S. 84. We rely on this reasoning. No picture of mutually exclusive or antagonistic defenses emerged at trial; the defendants conducted a unified defense.

2. The Burke petitioners allege that the admission of certain "hearsay" statements, especially testimony by the Ciaccios and LoCicero concerning threats made by Raul Charbonier, deprived them of their rights of confrontation and due process. However, as the court of appeals pointed out, most of the challenged statements concern events prior to October 8, and under the indictment were not the basis of the Burke petitioners' criminal liability. Most detrimental to the Burke petitioners were Raul Charbonier's call to LoCicero on October 8, telling him "they" had Ciaccio and were coming to see him, and his reminder to Fano Ciaccio on October 10 that, if the money were not paid within a week, "these fellows from up North" would be back to destroy the Ciaccios' lounge (Tr. 1327). But these statements were not hearsay; they were the very activity constituting the crime. Even if they were hearsay, they were admissible because there was "overwhelming independent evidence" (Charbonier Pet. App. I, p. A-14) both of the existence of a joint criminal venture to extort money and of the Burke petitioners' participation therein. *Fiswick* v. *United States*, 329 U.S. 211.

The Burke petitioners' contention that they were prejudicially misled by a preliminary statement of the trial court that the conspiracy rules of evidence were not applicable, and by the failure of the prosecution to define the scope and purpose of any conspiracy or joint venture in crime, was fully answered by the court of appeals (Charbonier Pet. App. I, pp. A-14 to A-15):

> We find no evidence in the record of disadvantage or prejudice to appellants. They were afforded full opportunity to present their objections, which they did—promptly, thoroughly, and unctuously. The trial judge, at an appropriate time, found that sufficient independent evidence of the "co-partnership," "joint venture," or common undertaking of a criminal objective existed to establish that relationship between defendants, to reinforce the reliability of the extra-judicial statements, and to furnish the necessary relevance of the evidence.

The suggestion that the statements were inadmissible absent a formal conspiracy count is not correct. See, *e.g., United States* v. *Talbot*, 470 F. 2d 158 (C.A. 6).

3. Relying on *Ashe* v. *Swenson*, 397 U.S. 436, petitioners contend that their federal conviction violates the double jeopardy clause and, at a minimum, that the testimony of Gaspar Ciaccio should have been excluded on the basis of collateral estoppel because he gave "identical testimony" about his beating and the threats against him during a state trial, on a charge of assault with intent to murder, which ended in petitioners' acquittal.[2]

---

[2]Petitioners were charged with assault with intent to murder in the state trial, but claim that the jury was instructed on lesser included offenses. The record on appeal below did not include these instructions.

Collateral estoppel, however, relates to relitigation of issues "between the same parties in any future lawsuit," 397 U.S. at 443. It therefore does not prevent the government from using in the federal trial testimony previously given in a state trial. Moreover, collateral estoppel applies only to issues actually litigated and decided in the first case. Ciaccio's testimony was important to the state case against petitioners, but their acquittal did not necessarily imply the jury's utter rejection of Ciaccio's version of events; the defense in the state trial was that Ciaccio's beating was a private altercation rather than a murderous assault.

Nor did the federal trial place petitioners in double jeopardy. The federal crimes involved extortionate extensions of credit and interstate travel as part of a gambling enterprise; the state crimes related to the physical assault. Different facts were necessary to prove the different crimes, and therefore the subsequent federal trial did not place petitioners twice in jeopardy.

4. The Charboniers' claim of prosecutorial misconduct was rejected by the court of appeals, which concluded that the incidents, statements, and arguments complained of, taken together, did not deny them a fair trial (Charbonier Pet. App. I, p. A-18).

The Charboniers direct their most vigorous complaints to what they describe as efforts of the prosecutor to "insinuate" to the jury that Ciaccio's beating on October 8 was confirmed by evidence of blood on some dollar bills carried by Ciaccio and on the interior of a car. There was no evidence of such blood. But the record shows that petitioners' counsel, not the prosecutor, persisted at final argument in asking the jury to draw inferences from or about an F.B.I. laboratory report (showing a lack of blood) which, although furnished to the

defense before trial, was not introduced in evidence.[3] The court reprimanded counsel for this argument. In rebuttal, the prosecutor alluded to an "object or evidence" which he had not succeeded in introducing in evidence "because of objection by defense counsel." The prosecutor's reference was to blood-stained dollar bills that had been carried by Ciaccio, but which had not been admitted. The court admonished the prosecutor not to "refer to that further" and in a bench conference reprimanded him in language that is itself significant:

> Mr. Dempsey, what are you doing, you are either rising to or descending to the level of some of the defense's arguments in an attempt to respond; and I say for the record that some of it should be responded to; but I don't know of any way of doing it without compounding the error that shouldn't have been made. [Supp. Tr., Rebuttal at 40.]

The court gave a curative instruction; it informed the jury of the right of counsel to object to or move to strike out evidence and warned against "[prejudice] * * * because counsel may have made such objections or motions * * *" (Supp. Tr., Jury Charge at 28). The prosecutor's single allusion to excluded evidence was, as the trial judge recognized, an unfortunate attempt by the prosecutor to correct an erroneous impression created by petitoners' counsel, and any prejudice resulting from the reference was neutralized by the court's instructions.

Similarly, although the prosecutor once suggested that a defense question was asked in bad faith (Tr. 1197), and elicited from Fano Ciaccio that he was still afraid of the Charboniers (Tr. 1430), the court in each instance ameliorated any arguable prejudice by instructing the jury to

---

[3]Supp. Tr., Argument at 31-32, 38-39.

disregard the remark or testimony. And, finally, the prosecutor's question to Gaspar Ciaccio inquiring why he made a tape recording of what happened to him (Tr. 606), was an attempt to lay a foundation for the admission of the tape; no misconduct was involved. Taken as a whole, the remarks and questions cited by petitioners, culled from a trial that spanned three weeks, fall well short of establishing prosecutorial misconduct resulting in denial of a fair trial. Cf. *Donnelly* v. *DeChristoforo*, 416 U.S. 637.

5. The Charboniers contend (Charbonier Pet. 9-10) that a remark of the prosecutor during final argument was a comment on their failure to testify. However, the Charboniers made no objection during trial. Nor is the prosecutor's argument, in context, such an obvious comment on the accused's failure to testify that it might be "plain error." The record shows that counsel for various petitioners injected the theme of "who were there" into the trial at several points, including an opening statement (Tr. 6) and final summation (Supp. Tr., Argument at 10, 89). Taken in context, therefore, the prosecutor's reminder to the jury in rebuttal that the people who were there were all the witnesses who testified and all of the defendants. was directed to the rhetoric of opposing counsel and not to the Charboniers' failure to testify. Moreover, the court specifically instructed the jury that no inference could be drawn from a defendant's failure to testify (Supp. Tr., Jury Charge at 29). As the court of appeals concluded, the prosecutor's statement was not intended to, nor would it inevitably, be taken by the jury as a comment on the failure to testify.

6. The Charboniers finally contend that the trial court erred by refusing to give instructions that the testimony of an "admitted perjurer" is to be scrutinized carefully.

They sought the instructions in connection with the testimony of Fano Ciaccio. The court of appeals determined, and the record confirms (Tr. 1396, 1420), that because of language difficulties Ciaccio became confused and on cross-examination made misstatements about whether he had previously discussed the case with the prosecutor. Ciaccio also conceded that at the state trial he had falsely denied knowing about his brother's gambling; he explained that he had been afraid to speak because of the treatment received by his brother (Tr. 1353). Although the trial judge did not give the requested instructions, he allowed defense counsel to argue to the jury the import of Ciaccio's apparent perjury (Tr. 2034). In addition, he gave a general instruction about the credibility of witnesses (Supp. Tr., Jury Charge at 31-32); this combination adequately covered the issues, although it did not use the words the Charboniers suggested. *Posey* v. *United States*, 416 F. 2d 545 (C.A. 5), certiorari denied, 397 U.S. 946; *United States* v. *Harvey*, 428 F. 2d 782 (C.A. 9). The judge did not abuse his discretion; petitioners have had a fair trial.

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1974.

DOJ-1974